REMARKS

Claims 1-23 remain in the application. Claims 1-8, 11-13 and 17-23 have been cancelled because they have been withdrawn from consideration as directed to a non-elected invention. Claims 9, 10 and 14-16 stand rejected. Claim 15 is objected to but is otherwise in condition for allowance.

In the office action of April 21, 2006, the Examiner required restriction to two groups of claims. Group 1, including claims 1-16, was drawn to apparatus for evaluating a patient's laryngeal cough reflux function, classified in class 600, sub class 546. The second Group included claims 17-23 drawn to a process for evaluating a patient's laryngeal cough reflex function classified in class 600, sub class 560.

In response to that office action, on or about May 15, 2006, applicant elected the claims of Group 1, drawn to claims 1-16 for prosecution on the merits.

Subsequently, on or about July 9, 2006, the Examiner telephoned the undersigned with respect to an election of species requirement. At that time the undersigned made a provisional election without traverse to prosecute the election of species B and AA, drawn to claims 9-10 and 14-16. This election is confirmed and is without traverse.

All non-elected claims have been cancelled with this response.

The Examiner objected to claim 15 because the term "approximately" was considered indefinite. Claim 15 has been amended to replace the word "approximately" with the word "substantially", thus overcoming the rejection.

The Examiner rejected claims 9 and 15 on the grounds of non-statutory obviousness type double patenting as being unpatentable over claims 9 and 13-15 of U.S. Patent No. 6,561,195. The Examiner states:

> "Although the conflicting claims are not identical, they are not patentably distinct from each other because the patented claims are merely a broader recitation of the instant case."

Claims 9 and 13-15 of U.S. Patent No. 6,561,195 contain neither an "electrical switch associated with said nebulizer and responsive to actuation of said nebulizer" nor "an EMG machine." The Examiner has failed to provide any rationale explaining why it would be obvious to modify the invention of claims 9 and 13-15 of U.S. Patent No. 6,561,195 to include these features. Neither the phrase "electrical switch" nor the phrase "EMG machine" occur in the '195 patent. Therefore, claims directed to such limitations would not be obvious over the specification of the '195 patent. Since the Examiner has applied no other arguments and has identified no other reasons why these elements would be obvious to include in the claims of the '195 patent, the Examiner has not established a prima facie case of obviousness type double patenting. Accordingly,

applicant respectfully requests that the rejection be withdrawn.

The Examiner rejected claim 9 on the grounds of non-statutory obviousness type double patenting as unpatentable over claims 14-16 of U.S. Patent No. 6,568,397. Again, the Examiner has cited no reference nor provided an argument why claim 9 would be obvious over claim 14-16 of the '397 patent, Neither the phrase "electrical switch" nor the phrase "EMG machine" occur in the '397 patent. Therefore, claims directed to such limitations would not be obvious over the specification of the '397 patent. Since the Examiner has applied no other arguments or identified no other reasons why these claimed elements would be obvious to include in the claims of the '397 patent, the Examiner has not established a prima facie case of obviousness type double patenting.

The Examiner rejected claim 9 under 35 U.S.C. § 112, second paragraph as indefinite. The Examiner states:

> "A single claim which appears to claim both an apparatus and the method steps of using the apparatus is indefinite under 35 U.S.C. 112, second paragraph."

The Examiner has failed to identify a method step in claim 9. Rather, claim 9 correctly recites a combination of elements which is an apparatus. Accordingly, applicant respectfully requests that the Examiner reconsider the rejection and withdraw it.

The Examiner rejected claim 9 under 35 U.S.C. § 101 because the claimed invention is directed to non-statutory subject matter. The Examiner states:

> "The claim is directed to neither a "process" nor a "machine," but rather embraces or overlaps two different statutory classes of invention set forth in 35 U.S.C. 101 See MPEP 2173.05(p)."

The Examiner has failed to identify a method step in claim 9. Rather, claim 9 correctly recites a combination of elements which is an apparatus. Accordingly, applicant respectfully requests that the Examiner reconsider the rejection and withdraw it.

The Examiner rejected claims 9-10 and 16 under 35 U.S.C. § 102 as anticipated by Hill et al (Hill). The Examiner states:

> "Hill et al discloses an apparatus, comprising: (a) an inhalation-activated nebulizer (column 4 lines 5-23 and column 5 lines 22-26); (b) an electrical switch 250 associated with said nebulizer (column 16 lines 10-30); (c) an EMG 230 machine having one or more EMG sensing electrodes 270; and (d) a connection comprising at least one wire between said switch and said EMG machine as best seen in Figure 1."

The Examiner has failed to identify where in the text of the Hill patent an "EMG" machine is identified. Item 230 is shown in Figure 1 and is identified as a controller and not as an EMG machine. The language of claim 9 requires "an electrical switch associated with said nebulizer and responsive to actuation of said nebulizer." That is not taught

or suggested in the Hill patent. Further, claim 9 requires "an EMG machine having one or more sensing electrodes connectable to the patient for sensing muscular electrical activity; and a connection between said switch and said EMG machine to thereby activate the EMG machine responsive to said switch." There is no teaching or suggestion in the Hill patent that a switch, which is associated with the nebulizer is activated when the nebulizer is actuated, activates an EMG machine in response to the switch. Accordingly, the Hill disclosure fails to anticipate claim 9-10 and 16.

The Examiner rejected claims 14 and 15 under 35 U.S.C. § 103 as unpatentable over Hill in view of Chen et al. The Examiner states:

> "Chen et al discloses the use of atomized tartaric acids and salts in therapeutic pharmacological agents (paragraphs 24, 104-106, and table 19)."

Claim 14 recites "one or more salts of tartaric acid." Claim 15 requires "a composition made with up to substantially 20% tartaric acid."

The only reference to tartaric anything occurs in column 17, line 4 of the specification of the published application and that reference is to "diacetylated tartaric acid esters of mono- and diglycerides." There is no disclosure in the reference of tartaric acid nor of one or more salts of tartaric acid is required by these claims. The Examiner has made no argument concerning why it would have been obvious to utilize a salt of tartaric acid or tartaric acid itself in

view of a teaching of "diacetylated tartaric acid esters of mono-and diglycerides." Accordingly, the Examiner has failed to establish a prima facie case of obviousness of claims 14 and 15.

For the reasons indicated, applicant respectfully requests the Examiner to reconsider the rejection and allow the claims under examination.

Should any minor informalities need to be addressed, the Examiner is encouraged to contact the undersigned attorney at the telephone number listed below.

Please charge any shortage in fees due in connection with the filing of this paper, including Extension of Time fees, to Deposit Account No. 01-0484 and please credit any excess fees to such deposit account.

Respectfully submitted,

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Serial No. **10/783,442**
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